

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

MEMORANDUM & OPINION  
- against -  
21-CR-81 (KAM)

JOVAN DANIELS,

Defendant.

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KIYO A. MATSUMOTO, United States District Judge:

Defendant Jovan Daniels is charged in a three-count Indictment with possession of OxyContin with intent to distribute it, in violation of 21 U.S.C. § 841; using or carrying a firearm in relation to Count One, in violation of 18 U.S.C. § 924(c); and knowingly and intentionally possessing a firearm, knowing that he had previously been convicted of a felony offense, in violation of 18 U.S.C. § 922(g). (ECF. No. 4, Indictment.) After pleading not guilty and electing to proceed to trial, Mr. Daniels moved pursuant to Rule 12(b) (3) of the Federal Rules of Criminal Procedure to suppress: (1) physical evidence seized from his person and a parked car in which he was a back seat passenger on January 2, 2021, and (2) his subsequent post-arrest statements. (See ECF No. 24, Defendant's Motion to Suppress ("Def. Mot.") at 1.)

On September 9, 2021, the court held an evidentiary hearing on Mr. Daniels's motion to suppress. The court has considered the parties' motion papers submitted in advance of the hearing, (ECF No. 25, Gov't's Opp'n Mem. ("Gov. Mem.")); ECF No. 27, Def.'s Reply ("Def. Reply")), evidence and testimony presented at the hearing, and the parties' post-hearing briefing, (ECF No. 47, Def.'s Supp. Mem. ("Def. Supp. Mem.")); ECF No. 48, Gov't's Supp. Opp. ("Gov. Supp. Mem.")); ECF No. 49, Def.'s Supp. Reply ("Def. Supp. Reply")); ECF No. 50 Gov't's Supp. Reply ("Gov. Supp. Reply")).

At the suppression hearing, the government called as witnesses New York City Police Department Detectives William Pugliese and Kevin McGinn, who along with two colleagues, arrested Mr. Daniels and his two companions in the vehicle at the time of his arrest on January 2, 2021. The defendant called as a witness Ms. Janelle Gavin, one of the two companions in the car with Mr. Daniels. In light of Detectives Pugliese's and McGinn's credible testimony and for the reasons set forth below, the court finds that the NYPD detectives' actions in arresting, searching, and interviewing Mr. Daniels on January 2, 2021 did not violate the Fourth or Fifth Amendments and, therefore, denies defendant's motion to suppress.

## **BACKGROUND**

### **I. Factual Background**

At the September 9, 2021 evidentiary hearing, the government called two of the four NYPD detectives present at the January 2, 2021 arrest: Detectives Pugliese and McGinn. In addition, the court admitted various exhibits, including photographs of Georgia Avenue, the street in East New York where the incident took place and photographs of the contraband recovered. The court finds that detectives testified credibly and, based on their testimony and the exhibits admitted into evidence, makes the following findings of fact.

On January 2, 2021, four NYPD detectives from the Brooklyn North Violent Crime Squad were on patrol in two cars in the East New York neighborhood of Brooklyn. (See September 9, 2021 Suppression Hearing Transcript ("Tr.") at 10-11, 60-63.) Detectives Michael Scoloveno and Michael Lassen were in the lead car, and Detective Pugliese was driving the second car with Detective McGinn in the passenger seat. (*Id.* at 11, 62.) At approximately 3:40 p.m., the detectives were traveling northbound on Georgia Avenue between Blake Avenue and Sutter Avenue, near 333 Georgia Avenue and approaching the intersection with Sutter Avenue. (*Id.* at 11-12, 62-63.) At this specific block of Georgia Avenue, there is only one lane of northbound traffic and two parking lanes with cars parked on both sides of

the street. (*Id.* at 19; *see also* Government Hearing Exhibits ("Gov. Ex.") 1A, 1D.)<sup>1</sup> On January 2, 2021, it was a relatively warm day in New York, with temperatures between 47 and 49 degrees. (See ECF No. 45.) Detectives Pugliese and McGinn were driving the patrol car with the windows down, consistent with the detectives' common practices while driving on patrol to better hear and see their surroundings. (Tr. at 12, 63.)

As the NYPD detectives approached the intersection of Georgia Avenue and Sutter Avenue, the lead patrol car slowed down for the red light at the intersection. (Tr. at 11-13.) The second car driven by Detective Pugliese also slowed down behind the lead car. (*Id.* at 13, 47.) As Detective Pugliese slowed his car, he smelled the odor of marijuana outside and to the left of his car from his driver's window. (*Id.* at 13.) After Detective Pugliese stopped his car, he turned to his left and observed a blue Nissan Altima (the "Altima") parked on the left side of Georgia Avenue (*i.e.*, next to the driver's side of Detective Pugliese's car (*id.* at 66)), approximately two to three feet from his driver's window. (Tr. at 13-17, 20-22, 48, 65; Gov. Exs. 1A, 1D, 2.) Detective Pugliese recognized the individual sitting in the driver's seat of the Altima as Miguel

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<sup>1</sup> At the beginning of the evidentiary hearing, the parties stipulated to the admission of Government Exhibits 2 through 11 into evidence, which the court received into evidence. (Tr. at 5-6.) The government also admitted, without objection, a stipulation from Detective Lassen. (Gov. Ex. 15.)

Andino -- known to Detective Pugliese as a member of a violent gang operating in the area -- and Detective Pugliese also observed Mr. Andino exhale a thick plume of white smoke, which did not appear to Detective Pugliese to be tobacco cigarette smoke based on his training and experience. (Tr. at 13, 24-25, 28.) From Detective Pugliese's vantage point inside his car, he could see that Mr. Andino's window was open. (*Id.* at 24.)

After observing Mr. Andino smoking and smelling the marijuana odor, Detective Pugliese alerted Detective McGinn that he intended to get out of the car to approach the Altima. (Tr. at 56, 64.) Detective McGinn, who was sitting in the front passenger seat of the unmarked police car, recalled being alerted by Detective Pugliese but Detective McGinn did not smell the odor of marijuana and he did not observe anyone inside the Altima smoking marijuana. (*Id.* at 65.)

After exiting the police car, Detective Pugliese approached the driver's side of the Altima from the driver's side of his vehicle to enforce the then-existing New York state law prohibiting the possession and use of marijuana.<sup>2</sup> (Tr. at 26, 50.) Detective McGinn walked behind the police car in which he had been patrolling and approached the front passenger side

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<sup>2</sup> Adult recreational use of marijuana was legalized in the State of New York on March 31, 2021 by the Marijuana Regulation & Taxation Act. See generally Laws & Regulations, New York State Office of Cannabis Management, <https://cannabis.ny.gov/laws-regulations> (last visited Oct. 1, 2021).

seat of the Altima where Janelle Gavin -- Mr. Andino's girlfriend and the owner of the Altima -- was sitting. (*Id.* at 27, 31, 67, 99-100.) As Detective McGinn walked towards the Altima, he smelled the odor of marijuana. (*Id.* at 67.)

As Detective Pugliese approached the Altima, he smelled a stronger odor of marijuana, and he observed Mr. Andino with a lit marijuana cigarette in his right hand. (Tr. at 26.) In addition to the odor, Detective Pugliese recognized the lit cigarette as a marijuana cigarette by the color of the wrapping paper and the absence of a filter. (*Id.* at 26-27; *see also* Gov. Ex. 7 (photo of marijuana cigarette).)

When Detective Pugliese approached the Altima's front driver's side door, Mr. Andino said to him, in sum and substance, "we're just smoking some weed, Officer." (Tr. at 27.) When Detective McGinn was within approximately a foot of the passenger side of the car near Ms. Gavin, Detective McGinn also observed Mr. Andino with a lit marijuana cigarette in his hand. (*Id.* at 67-68, 69.) From Detective McGinn's vantage point, he observed two silver packages on the back seat near where Mr. Daniels was sitting that Detective McGinn recognized as packages for marijuana, and also cash. (*Id.* at 69-70, 74-75; *see* Gov. Ex. 7 (photo of marijuana cigarette and marijuana packages from the back seat of the Altima).)

Both Detectives Pugliese and McGinn credibly articulated their observation-based beliefs that the occupants of the Altima were smoking marijuana in violation of state law, and Detective McGinn observed additional contraband in plain view on the back seat of the Altima. (*Id.* at 27, 39-40, 70; see also Gov. Ex. 7.) Both detectives testified that they both intended to search the Altima for further contraband. (*Id.*) To conduct the search, Detective Pugliese and Detective McGinn asked the occupants of the Altima to get out of the car. (*Id.* at 28, 70.) Detective Pugliese asked Mr. Andino to get out of the car and frisked Mr. Andino for weapons, in light of Mr. Andino's known membership in a violent gang. (*Id.* at 28.) Detective Pugliese did not find any contraband on Mr. Andino's person, and thereafter he directed Mr. Andino stand with Detectives Scoloveno and Lassen, who had just arrived at the Altima. (*Id.* at 28, 71, 78.) Detective McGinn asked Ms. Gavin to step out of the Altima, and he checked her outer pockets and looked for any indications that she might be carrying a weapon. (*Id.* at 71.) Detective McGinn did not find any weapons on Ms. Gavin and asked her to stand at the rear of the passenger side of the car. (*Id.*)

After Mr. Andino and Ms. Gavin were searched, Detective Pugliese then asked Mr. Daniels to exit the car in order for the detectives to search the vehicle. (Tr. 28.)

Detective Pugliese conducted a pat down of Mr. Daniels and felt an object in the defendant's pocket that he believed was a firearm magazine. (*Id.* at 28, 30.) Detective Pugliese asked the defendant what the object was, and the defendant responded that it was his keys. (*Id.* at 29.) Detective Pugliese did not believe the object felt like keys, and he retrieved the object from the defendant's pocket, discovering that it was a loaded magazine for a firearm. (*Id.*; see Gov. Ex. 5 (photo of magazine from Mr. Daniels's pocket).) Detective Pugliese alerted the other detectives and placed the magazine on the roof of the Altima. (*Id.* at 29, 72.) After discovering the loaded magazine, the detectives placed all occupants in the vehicle in handcuffs for safety reasons. (*Id.* at 29, 72.) Detective Pugliese then continued the pat down of Mr. Daniels and discovered a firearm in the defendant's waistband, which Detective Pugliese also placed on the roof of the Altima. (*Id.* at 29-30, 72; see Gov. Ex. 5 (photo of magazine and firearm).) After arresting the defendant, Detective Pugliese could see in plain view the same two silver packages observed by Detective McGinn on the back seat of the Altima, and that Detective Pugliese, like Detective McGinn, recognized from his training and experience as containing marijuana. (*Id.* at 30-31; see Gov. Ex. 7.) The detectives placed all three occupants of the car under arrest -- the defendant for possessing the firearm and

magazine, and Mr. Andino and Ms. Gavin for possessing marijuana. (*Id.* at 30, 72.)

In contrast to the detectives' testimony, according to Ms. Janelle Gavin,<sup>3</sup> the sole witness called by defendant, on January 2, 2021, Ms. Gavin and her boyfriend Miguel Andino were parked in the Altima on Georgia Ave, Brooklyn, New York, near the vicinity of 333 Georgia Avenue. (Tr. at 99-101.) Ms. Gavin testified that she and Mr. Andino were alone in the Altima for approximately 30 minutes smoking marijuana with the windows up and car vents turned on around 3:00 pm on January 2, 2021. (*Id.* at 101.) Ms. Gavin and Mr. Andino stopped smoking marijuana at some point and put the marijuana cigarette in an ashtray in the cup holder before defendant Daniels entered the Altima. (*Id.* at 101-03.) Approximately fifteen minutes after Ms. Gavin and Mr. Andino stopped smoking marijuana, the NYPD detectives stopped adjacent to the Altima and proceeded to ask each occupant in the Altima to exit the car one at a time. (*Id.* at 105-06, 108-110.) Ms. Gavin testified that when the detectives exited the police car and approached the Altima, they immediately, without any conversation, opened the driver's side door and asked Mr. Andino to exit the vehicle. (*Id.* at 108-09.) At the time when the police car stopped adjacent to the Altima, Ms. Gavin testified

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<sup>3</sup> Ms. Gavin was appointed CJA counsel and was represented by Michael Hueston, Esq. (See ECF No. 26.)

that there was no marijuana odor inside or outside the vehicle. (*Id.* at 106.) When Ms. Gavin was asked to step outside the car and while she was being arrested, she could not smell any marijuana. (*Id.* at 109-110.) For reasons explained below, the court finds Ms. Gavin's testimony not credible due to the numerous inconsistencies, her likely bias given her close relationship with Mr. Andino and defendant, and her impaired perceptions at the time of the incident due to her smoking marijuana.

After the defendant, Mr. Andino, and Ms. Gavin were placed under arrest, the detectives called NYPD dispatch to request assistance in transporting them back to the precinct. (*Tr.* at 31, 72.) Detective Pugliese drove his police car back to the precinct, and Detective McGinn drove the Altima back to the precinct. (*Id.* at 31, 72.) During the drive to the precinct, Detective McGinn smelled the odor of marijuana in the Altima and observed a marijuana cigarette in the ashtray in the center console. (*Id.* at 72-73.) Detective McGinn also observed the silver packages of marijuana and cash on the backseat of the car that he had previously observed while standing outside the Altima's passenger side window. (*Id.* at 74; *see also* Gov. Ex. 7.)

At the precinct, Detective Pugliese assisted Detective McGinn in searching the Altima. (*Tr.* at 31-32, 75.) In the

course of the search, detectives retrieved a partially smoked marijuana cigarette in the ashtray in the front console and, from the back seat, a plastic bag containing 35 Oxycodone pills, cash, and two packages containing marijuana. (*Id.* at 73, 75-77, 36; see Gov. Exs. 7, 8, 9 (photographs of the evidence recovered).) The detectives also located a Virginia license plate that was not registered to the Altima in the trunk of the car, and they determined that the license plate on the car was a "forged New Jersey temporary tag." (Tr. at 35-36, 77-78; Gov. Exs. 6, 10.)

## **II. Procedural History**

A sealed complaint and affidavit were filed on January 15, 2021. (ECF No. 1, Sealed Complaint.) On January 15, 2021, Magistrate Judge Lois Bloom signed an arrest warrant for defendant for "distributiong [sic] and possessing with intent to distribute oxycodone hydrochloride on or about Jan. 2, 2021, in violation of 21 U.S.C. § 841(b)(1)(C); using, carrying and possessing a firearm in furtherance of a drug trafficking crime on or about January 2, 2021, in violation of 18 U.S.C. § 924(c); being a felon in possession of a firearm on or about January 2, 2021, in violation of 18 U.S.C. § 922(g).". (See ECF No. 1; Dkt. Entry 1/15/2021.)

Following his arrest by the NYPD detectives on January 2, 2021, the defendant was released on bail with respect to

state charges and then arrested by federal authorities on January 19, 2021 on the complaint. (ECF No. 3, Pretrial Memorandum in Support of Detention Order, at 3.) Following his arrest by federal authorities, agents advised Mr. Daniels of his *Miranda* rights, after which defendant acknowledged that the gun and OxyContin pills were his. (*Id.* at 3.) An indictment was filed on February 10, 2021. (ECF No. 4, Indictment.)

On June 21, 2021, Mr. Daniels moved pursuant to Rule 12(b) (3) of the Federal Rules of Criminal Procedure to suppress (1) physical evidence seized from his person and the car in which he was a passenger on January 2, 2021, and (2) his subsequent post-arrest statements. (See generally Def. Mot. at 1.) In support of his motion to suppress, defendant submitted a sworn declaration from Ms. Gavin (ECF No. 24-1, ("Gavin Decl.")), to dispute the arresting detective's assertion that he approached the car because he observed the occupants smoking marijuana and smelled the odor of marijuana. On July 6, 2021, the government filed its opposition to Mr. Daniels's motion to suppress. (ECF No. 25.) The court scheduled an evidentiary hearing to hear testimony and receive evidence regarding Mr. Daniels's pending motion to suppress. (See Minute Entry 7/21/2021; Dkt. Orders 8/3/2021, 8/4/2021.)

Before the evidentiary hearing and following several productions of discovery to defendant, the government submitted

several motions *in limine* to preclude certain cross-examination of government witnesses and requesting the court to take judicial notice of the weather in Brooklyn on January 2, 2021, the day the defendant was arrested. (See ECF Nos. 30, 40, 41.) On September 8, 2021, the court issued an Order granting the government's motions *in limine* and taking judicial notice of the weather in Brooklyn on January 2, 2021, which was "between 47 and 49 degrees Fahrenheit" at the time of the incident giving rise to the prosecution of Mr. Daniels. (See ECF No. 45.)

On September 9, 2021, the court held an evidentiary hearing on Mr. Daniels's motion to suppress. (Minute Entry 9/10/2021.) Following the evidentiary hearing, the parties requested an opportunity to submit post-hearing briefing, which the court granted. (*Id.*)

#### **APPLICABLE LAW**

##### **I. The Fourth Amendment**

The Fourth Amendment of the United States Constitution prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. When a defendant moves to suppress evidence that he contends is derived from an illegal search, he "bears the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Osorio*, 949 F.2d 38, 40 (2d Cir. 1991) (citations omitted).

A. Reasonable Suspicion

"Under *Terry v. Ohio*, 392 U.S. 1 (1968), police may briefly detain an individual for questioning if they have a reasonable suspicion that criminal activity is afoot, and may frisk him if they reasonably believe he is armed and dangerous."

*United States v. Elmore*, 482 F.3d 172, 178 (2d Cir. 2007). An officer properly has reasonable suspicion when he or she is "aware of specific articulable facts, together with rational inferences from those facts that reasonably warrant suspicion."

*United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

"[R]easonable suspicion is determined based on the totality of the circumstances but 'the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.'" *Elmore*, 482 F.3d at 179 (quoting *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002)).

B. Probable Cause

Probable cause exists where the arresting officer has "knowledge or reasonably trustworthy information . . . sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." *Walzzyk v. Rio*, 496 F.3d 139, 156 (2d Cir. 2007). This standard is a "practical" one that analyzes the "factual and practical considerations of everyday life on which

reasonable and prudent men, not legal technicians, act."

*Maryland v. Pringle*, 540 U.S. 366, 270 (2003). Because the probable cause standard is fluid and contextual, a court must examine the totality of the circumstances of a given arrest from the perspective of a reasonable police officer in light of his training and experience. *United States v. Delossantos*, 536 F.3d 155, 159 (2d Cir. 2008) (citations omitted).

C. Automobile Exception

Under the "automobile exception" to the Fourth Amendment warrant requirement, police may conduct a warrantless search of a "readily mobile motor vehicle if probable cause exists to believe the vehicle contains contraband or other evidence of a crime." *United States v. Gaskin*, 364 F.3d 438, 456 (2d Cir. 2004); see also *United States v. Howard*, 489 F.3d 484, 492 (2d Cir. 2015) (same). So long as "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle," *Arizona v. Gant*, 129 S. Ct. 1710, 1713 (2009) (internal quotation marks omitted), the justification for the warrantless search "does not vanish once the car has been immobilized." *United States v. Johns*, 469 U.S. 472, 484 (1985).

"The scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *United States v. Ross*, 456 U.S. 798, 824 (1982). When the

police possess probable cause to believe a vehicle contains contraband, "they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages in the vehicle." *United States v. Miller*, 265 F. App'x 5, 8 (2d Cir. 2008) (summary order) (quoting *United States v. Cruz*, 834 F.2d 47, 51 (2d Cir. 1987)). Even if a vehicle is apparently immobilized -- as when, for example, the government has its driver in custody -- the vehicle retains its inherent "ready mobility" and no showing of actual mobility or exigent circumstances is relevant or required to justify a warrantless search. *United States v. Howard*, 489 F.3d 484, 492-94 (2d Cir. 2007). Furthermore, courts in this Circuit have agreed that, under the automobile exception, "a generalized smell of marijuana provides police with the right to search a defendant's vehicle and any containers within the vehicle where marijuana might be stored." *United States v. Spain*, No. 18-cr-569 (CM), 2019 WL 948814, at \*3 (S.D.N.Y. Feb. 13, 2019) (internal quotation marks omitted) (collecting cases).

#### **DISCUSSION**

With the foregoing legal principles in mind and for the reasons set forth below, the court concludes that the credible testimony and evidence elicited at the September 9, 2021 evidentiary hearing establish that the NYPD detectives had reasonable suspicion to approach the Altima and developed

probable cause to pat down and arrest individuals in the vehicle following the officers' observations and interactions with the occupants in the Altima. Accordingly, the court denies Mr. Daniels's motion to suppress the physical evidence seized from his person and the Altima and his subsequent post-arrest statements.

Mr. Daniels argues that the NYPD detectives did not have "a credible, articulable reasonable suspicion that criminal activity was 'afoot' at the time they approached [the Altima], nor did they have probable cause to arrest anyone in the vehicle at the time." (Def. Supp. Mem. at 2.) Defendant further argues that even if the detectives' testimony were credible and they had reasonable suspicion and/or probable cause to arrest, "such suspicion and cause was solely with respect to the person in the driver's seat . . . and did not provide a constitutional, legal basis for either removing the defendant from the automobile, seizing his person and frisking him, or generally searching the vehicle." (*Id.*) The court addresses the defendant's arguments below and concludes that, based on the totality of the circumstances, the NYPD detectives had reasonable suspicion to approach the Altima, which rapidly developed into probable cause to arrest the occupants, pat down their persons, and search the vehicle pursuant to exceptions under the Fourth Amendment's warrant requirement.

**I. Reasonable Suspicion to Approach the Altima**

As an initial matter, a *Terry* stop likely occurred when Detective Pugliese, who had smelled marijuana and observed Mr. Andino exhale what he believed to be marijuana smoke, exited his patrol car, approached the parked, idling Altima and ordered Mr. Andino to exit the Altima. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (A *Terry* stop, or a "seizure," occurs only when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."); *see, e.g., United States v. Lopez*, 432 F. Supp. 3d 99, 110 (D. Conn. 2020) (A "Terry stop began when Officer Rivera exited his patrol car and approached Lopez's vehicle while shouting instructions"). Under these circumstances, a reasonable person in Mr. Andino's and defendant's position would not believe they were free to leave. Thus, because a *Terry* stop occurred, the detectives were required to have, and did have, reasonable suspicion that criminal activity was afoot.

Applying the legal principles above and upon review of the totality of the circumstances, the undisputed facts establish Detective Pugliese's reasonable suspicion that defendant and defendant's companions may have been engaged in criminal activity while in the Altima. It is undisputed that Ms. Gavin and Mr. Andino were smoking marijuana for a period of

time in the Altima with the air circulation system on during the afternoon of January 2, 2021, while the Altima was parked on Georgia Avenue. Further, it is undisputed that Mr. Daniels had joined Ms. Gavin and Mr. Andino when the NYPD detectives were driving unmarked patrol cars northbound on Georgia Avenue near 333 Georgia Avenue and approaching the intersection with Sutter Avenue. Government exhibits admitted at the evidentiary hearing confirm that this particular section of Georgia Avenue was a narrow street with one lane of northbound traffic and cars parked on both sides of the street. (See Gov. Exs. 1A, 1D.) As the NYPD police car containing Detectives Pugliese and McGinn slowed down at a red light at the intersection of Georgia Avenue and Sutter Avenue, it is undisputed that Detective Pugliese smelled the odor of marijuana through his open car door window and observed the smoking of what he suspected was marijuana in the parked Altima.<sup>4</sup> Finally, it is undisputed that Detective Pugliese alerted Detective McGinn that he intended to get out of the police car to approach the Altima. Accordingly, the undisputed facts establish that the detectives had reasonable suspicion to approach the Altima.

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<sup>4</sup> Defendant contests Detective Pugliese's statement that he observed Mr. Andino exhale a plume of white smoke (Def. Supp. Mem. at 3), but does not appear to contest the fact that the original affidavit supporting the application for arrest noted that Detective Pugliese observed the Altima parked in front of Georgia Avenue, "in which the occupants appeared to be smoking marijuana." (ECF No. 1, Complaint and Affidavit of Matthew Wiedemer ("Wiedemer Aff.") ¶ 3.)

Turning to the disputed facts, the material disputed facts to be resolved at the evidentiary hearing related to whether the detectives could credibly demonstrate that they had a reasonable basis to approach the Altima, and whether Ms. Gavin would credibly testify that no marijuana odor from the Altima could be detected by the detectives. Based on the following credibility findings, the court finds that the NYPD detectives had articulable reasonable suspicion to approach the Altima because they credibly believed that criminal activity was afoot (*i.e.*, that then-existing New York state laws prohibiting use and possession of marijuana were being violated).

Here, the detectives' credible testimony elicited at the evidentiary hearing established that the detectives' approach to the Altima was supported by reasonable suspicion. At the suppression hearing, Detective Pugliese explained that his police vehicle came to a stop just a few feet from the Altima where, with his window down, he smelled the odor of marijuana. (Tr. at 13, 20, 48, 65; Gov. Exs. 1A, 1D, 2.) Consistent with Detective Pugliese's testimony, defense witness Ms. Gavin also testified that the police car was "at most five feet" away from the Altima, and that she and Mr. Andino had been smoking marijuana for approximately thirty minutes in the Altima. (Tr. at 101, 107-08, 123; ECF No. 24-1, Declaration by Janelle Gavin ¶ 3.) From this close distance, Detective

Pugliese credibly testified that he "smelled the odor of marijuana emanating from the left side of my vehicle" and "observed a blue sedan with the driver exhaling a plume of smoke from his mouth."<sup>5</sup> (Tr. at 13:18-24.) Moreover, although Detective McGinn did not initially detect the marijuana odor, he explained that as he approached the Altima following Detective Pugliese, he smelled marijuana. (*Id.* at 67.)

Based on the totality of the circumstances, the court concludes that the detectives' approach to the Altima was supported by reasonable suspicion. The Second Circuit has explained that the smell of marijuana odor can provide an "objective basis for suspecting legal wrongdoing." See *United States v. Jenkins*, 452 F.3d 207, 214 (2d Cir. 2006) (holding that the smell of marijuana provided an "independent basis for continuing to detain" the car and its occupants (citation omitted)).

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<sup>5</sup> Defendant asserts that Detective Pugliese's testimony regarding the "plume" of white smoke he observed is inconsistent with the statements provided to the FBI agents and those contained in the affidavit supporting the arrest warrant application to the extent that the appearance of the "plume" of smoke was not mentioned in the agent's affidavit. (See Def. Supp. Mem. at 3-4.) Nevertheless, even if Detective Pugliese's statement regarding his observation of the "plume" of white smoke was mistaken, "a mistake of fact does not undermine the existence of reasonable suspicion." *United States v. Stewart*, 551 F.3d 187, 193 (2d Cir. 2009); see also *United States v. Jenkins*, 452 F.3d 207, 212 (2d Cir. 2006) ("The constitutional validity of a stop is not undermined simply because the officers who made the stop were mistaken about relevant facts."). Moreover, the agent's affidavit need not identify all the facts regarding the defendant's arrest.

Here, Detective Pugliese's detection of marijuana odor (which was soon thereafter detected by Detective McGinn when he approached the Altima), provided a basis for reasonable suspicion that criminal activity was afoot. *See, e.g., United States v. Watson*, No. 20-cr-346 (JSR), 2021 WL 535807, at \*5 (S.D.N.Y. Feb. 11, 2021) (finding reasonable suspicion "based on the fact that, while standing 'pretty close' to [defendant], the officers, already suspicious about the shape and wrapping of the cigar, began to detect the smell of marijuana"); *United States v. Garcia*, No. 18-cr-178 (AT), 2018 WL 3407707, at \*4 (S.D.N.Y. June 5, 2018) (finding reasonable suspicion where the smell of marijuana provided an "objective basis for suspected legal wrongdoing"); *United States v. Green*, No. 14-cr-6038 (EAW) (JWF), 2017 WL 9730254, at \*6 (W.D.N.Y. Nov. 3, 2017) ("[T]he reasonable suspicion standard appears to have been easily satisfied when Trooper Sitowski first approached the passenger side of the Cadillac and detected a strong odor of fresh marijuana coming from the inside of the car"), *report and recommendation adopted*, No. 14-cr-6038 (EAW), 2018 WL 1136928 (W.D.N.Y. Mar. 2, 2018). Indeed, Detective Pugliese's credible testimony that in addition to smelling marijuana, he also observed Mr. Andino exhaling a plume of marijuana smoke further bolsters the detectives' reasonable suspicion justifying their approach of the Altima. (See Tr. at 13.)

Furthermore, the court finds that the testimony of defense witness Ms. Gavin, asserting that the odor of marijuana could not be detected outside the Altima is not credible because she is not competent to testify what someone else could smell, and due to her inability to testify what could be smelled outside the Altima when she was still within it, the numerous inconsistencies in her testimony, her likely bias given her close relationship with Mr. Andino and defendant, and her impaired perception at the time of the incident due to her smoking marijuana. First, Ms. Gavin repeatedly and incorrectly identified Detectives Scoloveno and Lassen as the officers who first approached the Altima, when Detectives Pugliese and McGinn were the actual officers who first approached and questioned the occupants in the Altima. Specifically, Ms. Gavin testified that Detective Scoloveno first approached Mr. Andino; that Detective Scoloveno told Mr. Andino to get out of the car; and that Detective Scoloveno found the gun in the defendant's possession. (See Tr. 126-27 (identifying Detectives Scoloveno and Lassen as the arresting officers).) Second, the fact that Ms. Gavin is Mr. Andino's girlfriend and defendant's friend also diminishes her credibility due to her potential bias or interest in testifying. (*Id.* at 110-111 (confirming that Mr. Andino is her boyfriend and defendant is her friend).) Finally, although Ms. Gavin asserts that her perceptions were not altered when she

undisputedly was smoking marijuana proximate to the time of her police encounter on January 2, 2021 (see *id.* at 116:5-7), the court finds Ms. Gavin's assertion untenable, and a further reason to discredit Ms. Gavin's testimony.

For the foregoing reasons, the court concludes that the totality of the circumstances presented detectives Pugliese and McGinn with articulable and specific facts that led them to reasonably believe the occupants of the Altima may be involved in criminal activity. Thus, the detectives had reasonable suspicion to approach the Altima.<sup>6</sup>

## **II. Probable Cause to Search the Altima and Arrest the Occupants of the Altima**

Investigative stops can lead to lawful arrests where "the existence of a probable cause sufficient to support an arrest . . . develop[s] during the course of a stop based on reasonable suspicion." *United States v. Oates*, 560 F.2d 45, 63 (2d Cir. 1977); see also *United States v. Brockington*, 378 F. App'x 90, 91 (2d Cir. 2010) (summary order) ("[R]easonable

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<sup>6</sup> The court acknowledges that since the defendant's arrest on January 2, 2021, the state of New York has revised its laws regarding the recreational use of marijuana. At the time of defendant's arrest on January 2, 2021, however, it appears that possession of marijuana was unlawful under New York law. See N.Y. Penal Law § 221.05. On March 31, 2021, New York legalized the possession of up to 3 ounces of marijuana and up to 24 grams of marijuana concentrate for adults who are at least 21 years old, among many other reforms. See New York Office of Cannabis Management, Laws & Regulations, (available at: <https://cannabis.ny.gov/laws-regulations>). In any event, at the time of defendant's arrest in January 2021, and at the present time, marijuana may not be consumed in a vehicle. New York law prohibits the "consumption of cannabis" in a car "located upon the public highways or right-of-way public highway." N.Y. Veh. & Traf. Law § 1227.

suspicion may develop into probable cause based on events unfolding during an investigative stop" (citing *United States v. Vasquez*, 638 F.2d 507, 522 (2d Cir. 1980)). An officer has probable cause to arrest someone when the officer has "reasonably trustworthy information as to [the] facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007). When courts assess whether a police officer had probable cause to arrest, they consider "whether the facts known by the arresting officer at the time of the arrest objectively provided cause to arrest." *Jaegly v. Couch*, 439 F.3d 149, 153 (2d Cir. 2006).

Here, the court concludes that the detectives had reasonable suspicion to approach the Altima, as discussed above, during which probable cause developed, which justified the officers' arrest of the occupants and the search of the Altima, when the detectives observed Mr. Andino with a lit marijuana cigarette, confirmed the marijuana smell was emanating from the Altima, and saw what appeared to be narcotics in the vehicle in plain view, including the marijuana cigarette in the center console and packets of marijuana in the back seat. The credible testimony elicited at the evidentiary hearing confirmed as follows: When Detective Pugliese arrived at the Altima's

driver's side window, he observed Mr. Andino with a lit marijuana cigarette in his right hand and Mr. Andino admitted he was smoking marijuana when he said, in sum and substance, "We're just smoking some weed, Officer."<sup>7</sup> (Tr. at 27.) Detective Pugliese recognized the lit cigarette as a marijuana cigarette by the color of the wrapping paper, the absence of a filter, and the odor. (*Id.* at 26-27.) Detective McGinn also testified that he observed Mr. Andino with a lit marijuana cigarette in his hand. (*Id.* at 67-68, 69.) And Detective McGinn explained that, from his vantage point at the Altima's front passenger side window, he could also smell the marijuana smoke and see two packages in the back seat of the car that he recognized as containing marijuana. (Tr. at 69-70, 74-75.)

With respect to a search of the vehicle, the court concludes that, based on the credible testimony by the detectives presented at the evidentiary hearing, they had sufficient probable cause to search the Altima for other contraband. *See United States v. Goolsby*, 820 Fed. App'x 47, 49 (2d Cir. 2020) (summary order) (holding there was probable cause to search the defendant's vehicle and any containers in which

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<sup>7</sup> Even excluding the reference to "weed" in Mr. Andino's statement (see Def. Supp. Mem. at 5-6), the court concludes that the totality of the circumstances involving the odor of marijuana and the observation of a lit marijuana cigarette and marijuana packages in the back seat of the Altima provide sufficient probable cause to reasonably believe that defendant and occupants in the Altima had unlawful possession of marijuana.

marijuana could be stored where the officer smelled burnt marijuana and the defendant said he had been smoking "earlier").

Specifically, under the automobile exception, based on a generalized smell of marijuana, police officers may search the defendant's vehicle and any containers where marijuana may be discovered. *See, e.g., United States v. Whitlock*, No. 20-cr-17, 2021 WL 1439846, at \*7 (D. Vt. Apr. 16, 2021) ("The smell of marijuana established probable cause for federal law enforcement's search of the [Nissan] Sentra under the automobile exception."); *United States v. Spain*, No. 18-cr-569 (CM), 2019 WL 948814, at \*3 (S.D.N.Y. Feb. 13, 2019) (probable cause to search vehicle and contents in the vehicle under the automobile exception if officers detected the smell of marijuana emanating from a car); *United States v. Sanders*, No. 19-cr-125, 2021 WL 81654, at \*2 (W.D.N.Y. Jan. 11, 2021) (probable cause to search a vehicle where the officer smelled marijuana emanating from the vehicle, was informed by a co-defendant that he was smoking marijuana earlier, and observed defendant move in a slow, cautious way); *United States v. Mack*, No. 17-cr-6159 (EAW) (JWF), 2018 WL 8898465, at \*7 (W.D.N.Y. Nov. 29, 2018) ("[T]he smell of marijuana gave the officers probable cause to search any area of the Sedona where marijuana could be found"), *report and recommendation adopted*, No. 17-cr-06159 (EAW), 2019 WL 2590741 (W.D.N.Y. June 25, 2019). Indeed, the Second Circuit has

explained that where, as here, "a marijuana cigarette was seen in the open ashtray" of a car, there is "a fair probability that contraband or evidence of a crime would be found" elsewhere in the vehicle. *United States v. Carter*, 173 F. App'x 79, 81 (2d Cir. 2006) (summary order). Thus, because Detectives Pugliese and McGinn both smelled and observed marijuana in the Altima, there was probable cause to search the Altima for evidence of contraband under the automobile exception. (*Id.* at 26-27, 67-68, 69.)

Second, the court concludes that credible evidence established that the detectives had probable cause to arrest defendant and the occupants of the vehicle for the unlawful possession of marijuana.<sup>8</sup> Detective McGinn credibly testified that he observed two silver packages containing what he believed to be marijuana in the back seat of the Altima where Mr. Daniels was sitting. (Tr. at 69-70, 74-75.) Furthermore, both detectives testified that they smelled the odor of marijuana and observed Mr. Andino with a lit marijuana cigarette. (*Id.* at 26-27, 67-68, 69); see *United States v. Bignon*, 813 F. App'x 34, 37

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<sup>8</sup> As discussed above, the January 2, 2021 arrest of defendant and the occupants of the Altima predicated recent changes to the New York Penal Code regarding the possession of marijuana. See *United States v. Sayles*, No. 19-cr-186 (RJA) (MJR), 2021 WL 3195016, at \*15 n.20 (W.D.N.Y. May 6, 2021) (concluding that probable cause existed to arrest defendant for possession of marijuana because the arrest predicated the recent changes to New York law regarding marijuana possession), report and recommendation adopted, No. 19-cr-186, 2021 WL 3191886 (W.D.N.Y. July 28, 2021).

(2d Cir. 2020) (summary order) (probable cause to arrest for possession of marijuana arose where officers believed defendant was smoking marijuana because of the color of the smoke, the smell of the smoke, and defendant's behavior when he saw a police officer); *United States v. Echevarria*, 692 F. Supp. 2d 322, 334 (S.D.N.Y. 2010) (probable cause to arrest defendant based on smell and sight of marijuana); *United States v. Marley*, No. 16-cr-374 (VEC), 2017 WL 4998199, at \*9 (S.D.N.Y. Oct. 31, 2017) (probable cause to arrest defendant for possession of marijuana where interior of his vehicle smelled like marijuana), *aff'd*, 800 F. App'x 4 (2d Cir. 2020). As experienced detectives with narcotics training (see Tr. at 10:10-12, 61:13-15), Detectives Pugliese and McGinn had probable cause, based on the facts present during their January 2, 2021 interaction with Mr. Daniels and his companions, discussed above, to arrest defendant and the occupants of the Altima for unlawful marijuana possession.

With respect to automobile passengers, the Supreme Court has explained that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." *Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999)); see also *United States v. Patrick*, 899 F.2d 169, 172 (2d Cir. 1990)

(holding that after drugs were discovered in defendant's backpack, agents had reasonable basis to believe that co-defendant "was not just a mere innocent traveling companion but was traveling and acting in concert" with defendant). Here, the court concludes that an objectively reasonable officer could conclude, based on the facts present during the January 2, 2021 encounter discussed above, that there was probable cause to believe defendant and the occupants of the Altima "committed the crime of possession of [marijuana], either solely or jointly." *Pringle*, 540 U.S. at 372; see *United States v. Pabon*, 871 F.3d 164, 174 (2d Cir. 2017) (In evaluating probable cause, "we consider the circumstances from the perspective of an objectively reasonable police officer, recognizing that the officer is entitled to draw reasonable inferences on the basis of his prior experience.").

For the foregoing reasons, based on the credible testimony and evidence admitted at the evidentiary suppression hearing, the court concludes that Detectives Pugliese and McGinn had sufficient probable cause to search the Altima and arrest defendant and the occupants for unlawful possession of marijuana in violation of then-existing New York law.

### **III. Search of Defendant Incident to His Arrest**

Because the detectives had probable cause to arrest defendant and the occupants of the Altima, the court concludes

that the detectives also had authority to conduct a protective pat down of defendant and the other occupants. As an initial matter, the Second Circuit has explained that during a lawful stop, "a police officer may take reasonable steps to ensure safety" such as ordering "the driver and passengers out of the car, even if he does not have a reason to search the car or its occupants." *United States v. Weaver*, 9 F.4th 129, 143 (2d Cir. 2021) (en banc). Thus, notwithstanding the detectives' lawful authority to search the Altima under the automobile exception discussed above, the detectives were also authorized to order both Mr. Andino and the passengers of the Altima to exit the vehicle during the lawful stop.

Detective Pugliese had authority to conduct a protective pat down of defendant because Detective Pugliese had probable cause to arrest defendant for unlawfully possessing contraband including marijuana in violation of then-existing New York law.<sup>9</sup> A search incident to arrest is fully justified if there is "probable cause when the defendant is put under arrest

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<sup>9</sup> Defendant notes that Detective Pugliese had the "discretion" to issue a summons based on the violation of marijuana laws (see Def. Supp. Mem. at 6), but does not, and cannot, dispute that a marijuana violation permits law enforcement to effectuate an arrest. See *People v. Morgan*, 781 N.Y.S.2d 652, 653 (2d Dep't 2004) (An "officer had probable cause to arrest the defendant either for the class B misdemeanor of criminal possession of marijuana in the fifth degree . . . or for the 'petty offense' of unlawful possession of marijuana" after smelling a strong odor of marijuana emanating from defendant's car and observing remains of marijuana cigarettes in the ashtray).

to believe that an offense has been or is being committed."

*United States v. Cruz*, 834 F.2d 47, 50 (2d Cir. 1987). As discussed above, the facts and circumstances of the January 2, 2021 incident were sufficient to cause an objectively reasonable officer to believe that the defendant had committed a crime.

(See *supra* Discussion II.) Thus, once Detective Pugliese acquired the probable cause to arrest defendant, he was permitted to conduct a protective search of the defendant and the vehicle, and a full search incident to arrest. See *United States v. Scopo*, 19 F.3d 777, 782 (2d Cir. 1994) ("[O]nce the police had probable cause to stop and arrest Scopo, they were entitled to search both him and his 'grab space' in the car[.]"); *United States v. McDow*, 206 F. Supp. 3d 829, 842 (S.D.N.Y. 2016) ("Once probable cause to arrest exists, officers may search the defendant's person incident to the arrest.").<sup>10</sup>

Finally, the court also concludes that once probable cause was established, it is irrelevant whether Detective Pugliese's search of defendant occurred prior or subsequent to his arrest. See *United States v. Wilson*, 94 F. App'x 14, 17 (2d Cir. 2004) (summary order) ("The mere fact that the trooper

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<sup>10</sup> Furthermore, in an unpublished summary order, the Second Circuit has also explained that an officer, upon observing individuals smoking marijuana in a car in violation of federal regulations, can "for his own safety, as well as to investigate further the drug offense, . . . pat down the occupants of the car." *United States v. Thorpe*, 122 F.3d 1058, 1997 WL 434086 (Table), at \*2 (2d Cir. 1997).

reversed the procedure, conducting the search before the arrest, did not render it illegal as long as probable cause to arrest existed at the time of the search." (quoting *United States v. Ricard*, 563 F.2d 45, 49 (2d Cir. 1977))). Accordingly, Detective Pugliese's pat down of defendant incident to defendant's arrest did not violate the Fourth Amendment. The detectives had probable cause to arrest the vehicle occupants for marijuana possession and conduct a protective pat down, during which the gun and magazine were discovered on Mr. Daniels. For the foregoing reasons, the court declines to suppress the magazine and firearm discovered during the pat down of defendant and, thus, denies defendant's motion to suppress.<sup>11</sup>

Furthermore, because the magazine and firearm were discovered through a lawful pat down of defendant based on the existence of probable cause to arrest him, the court also declines to suppress defendant's post-arrest statements as

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<sup>11</sup> Although the court concludes that the magazine and firearm were discovered lawfully following the pat down of defendant incident to his arrest, the court rejects the government's broad assertion that "[w]here officers have reason to believe that one person involved in a Terry stop is likely to be armed and dangerous, it is equally reasonable to believe those with whom that person is associating will also be armed and dangerous." (Gov. Supp. Mem. at 9-10, 19-20.) In other words, the government appears to argue that Mr. Andino's alleged gang affiliation (and subsequent dangerousness) should be imputed to Ms. Gavin and defendant simply because they were in the same car. The court declines to apply such a broad theory of dangerousness and reiterates that "[t]o justify a patdown of the driver or a passenger during a traffic stop, . . . the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). In any event, the court need not resolve the government's broad assertion because, for the reasons stated above, the magazine and firearm were lawfully discovered following a protective pat down of defendant incident to his arrest.

fruits from the poisonous tree. (See Def. Supp. Mem. at 18-19 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)).)

Though not applicable here, the exclusionary rule "reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *United States v. Cacace*, 796 F.3d 176, 188 (2d Cir. 2015) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). Statements made during custodial interrogation are generally inadmissible unless a suspect first has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Here, defendant was provided *Miranda* warnings after his arrest and he knowingly and voluntarily admitted that the gun and OxyContin were his. (See ECF No. 3, at 8.) Accordingly, the suppression of Mr. Daniels's post-arrest statements is not warranted under the fruit of the poisonous tree doctrine.

#### **IV. The Magazine and Firearm Would be Inevitably Discovered**

In its post-hearing brief the government argues that even if the searches yielding the weapon and narcotics were unreasonable, "the Court need not address the detectives' pre-search pat down of the defendant and the other occupants of the car, because the detectives would have inevitably discovered the firearm on the defendant's person and the other contraband inside the car when they searched it." (Gov. Supp. Mem. at 20.)

Under the "inevitable discovery" doctrine, evidence obtained during the course of an unreasonable search and seizure is nonetheless admissible "if the government can prove that the evidence would have been obtained inevitably" without the constitutional violation. *United States v. Heath*, 455 F.3d 52, 55 (2d Cir. 2006) (quoting *Nix v. Williams*, 467 U.S. 431, 447 (1984)). "The government bears the burden of proving inevitable discovery by a preponderance of the evidence." *United States v. Stokes*, 733 F.3d 438, 444 (2d Cir. 2013).

As discussed above, having detected the odor of marijuana and observed both Mr. Andino holding a lit marijuana cigarette and two silver packages containing marijuana in the back seat, the detectives had probable cause to search the Altima. If the detectives had asked defendant and the other occupants of the Altima to step of the vehicle without patting them down, it is certain that the detectives could have searched the car and would have discovered the Oxycodone, marijuana, and cash on the back seat, where the defendant was sitting. (See Tr. 75-77, 36; Gov. Exs. 7, 8, 9). Accordingly, the defendant and the other occupants of the car would have been placed under arrest for the oxycodone and marijuana, at which time all three would have been searched incident to their arrest. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that lawful custodial arrest authorizes "a full search of the person")

arrested). Thus, the magazine and the firearm in defendant's waistband inevitably would have been discovered. See, e.g., *United States v. Santillan*, 902 F.3d 49, 59 (2d Cir. 2018) (currency illegally seized during pat-frisk for weapons was nonetheless "admissible because it would have been inevitably discovered during a search incident to arrest after the officers discovered cocaine in the car"). In conclusion, even if Detective Pugliese's conduct in patting down defendant was unreasonable, which it was not, the firearm and magazine would be admissible because they inevitably would have been discovered during a search incident to arrest after the detectives discovered the marijuana and OxyContin in the back of the Altima near where Mr. Daniels was sitting.

**CONCLUSION**

For the foregoing reasons, the court respectfully denies Mr. Daniels's motion to suppress.

SO ORDERED.

/s/

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Hon. Kiyo A. Matsumoto  
United States District Judge  
Eastern District of New York

Dated: October 7, 2021  
Brooklyn, New York